



The Attorney General of Texas

December 18, 1981

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Equal Opportunity/
Affirmative Action Employer

Mr. Edward H. Perry
Assistant City Attorney
City Hall
Dallas, Texas 75201

Open Records Decision No. 296

Re: Public availability under
the Open Records Act of
information relating to air
pollution supplied to city
by corporation

Dear Mr. Perry:

Two city newspaper reporters have asked for certain information in your possession. You have agreed to divulge much of the requested material, but you seek to withhold copies of the complaints made to the city's Environmental Health and Conservation Department concerning lead pollution or poisoning in the city as well as certain information sent to the city by the RSR Corporation.

You ask whether the Open Records Act, article 6252-17a, V.T.C.S., authorizes you to withhold this information. With respect to the complaints, you contend that section 3(a)(1) of the act permits you to withhold information contained therein that would tend to reveal the identities of those who furnish information of possible violations of air pollution laws and ordinances to city officials charged with enforcement of same. With respect to the material submitted by the RSR Corporation, you contend that certain portions contain "trade secrets" which may be withheld under sections 3(a)(4) and/or 3(a)(10) of the act.

Section 3 of the Open Records Act authorizes you to withhold:

(1) information deemed confidential by law,
either Constitutional, statutory, or by judicial
decision;

...

(4) information which, if released, would
give advantage to competitors or bidders;

...

(10) trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

We first consider the complaints. We understand, based on previous correspondence with your office, that the city's Environmental Health and Conservation Department enforces local and state requirements pertaining to air pollution. Enforcement options include criminal prosecution for violations of city ordinances, regulations, or the Texas Penal Code. Violations of city ordinances constitute Class C misdemeanors.

In Open Records Decision No. 279 (1981), we determined that the identity of a person who reports a zoning ordinance violation to a city is excepted from disclosure as information deemed confidential by the informer's privilege. There, as here, violators of the ordinance in question were guilty of criminal offenses, i.e., Class C misdemeanors.

Based on Open Records Decision No. 279 (1981), we conclude that you may withhold information that tends to identify those who made complaints to the city concerning lead pollution or poisoning.

We next consider the information which you contend constitutes "trade secrets," which is identified in your letter to this office as "Exhibit C." With respect to this information, counsel for the RSR Corporation stated, in a letter to you, that:

It is our understanding that the only RSR information currently being withheld relates to raw material usage, production data, and production and emission control processes and associated equipment... RSR has spent many years and millions of dollars developing its production process, modifying its production and emissions control equipment, and adjusting its blend of raw material input. The result has been a unique technology and a high quality pure lead product that have enabled the company to survive in the highly competitive lead recycling industry. If a corporation -- without investing the time and money RSR has invested -- were to have access to information which revealed the blend of raw materials used by RSR, or the design of RSR's equipment, or the nature of RSR's production process and equipment, that competitor would have a substantial, and, we submit, a very unfair, advantage.

We have recently discussed the applicability of section 3(a)(10). See Open Records Decision Nos. 255, 238 (1980); 175 (1977). In those decisions we observed that Texas has adopted the definition of "trade secret" contained in the Restatement of Torts, section 757, comment (b) (1939). Hyde Corporation v. Huffines, 314 S.W.2d 763 (Tex. 1958); see also Luccous v. J.C. Kinley Co., 376 S.W.2d 336 (Tex. 1964). That definition provides that:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers... (Emphasis added).

The Restatement lists six criteria to be used in determining whether particular information qualifies as a "trade secret":

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts §757, comment (b) (1939).

With respect to these criteria, RSR's counsel stated in the aforementioned letter that:

RSR believes that the information contained in the requested documents is known outside the company only by the few government officials to whom it has been provided. Indeed, the information is known by only a relatively small number of RSR employees; RSR employees are provided information on a 'need to know' basis only and with strict non-disclosure instructions. Stringent measures have been taken by the company to prevent unauthorized disclosure of information. All RSR facilities are provided with a security force and

are closed to all non-RSR employees. Visits to RSR facilities from government personnel, other than mandated inspection and enforcement visits, require a written predetermination of the information sought and the intended use of the information to be gathered. In addition to those restrictions, contractors of government agencies are required to sign third party confidentiality agreements with RSR. Thus, RSR believes that its competitors would have great difficulty properly acquiring or duplicating the information in question here.

In order to be entitled to the protection of the trade secret doctrine:

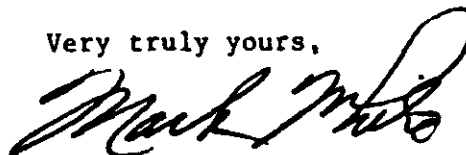
the owner of a trade secret must do something to protect itself from the use of such secret.

Rimes v. Club Corp. of America, 542 S.W.2d 909, 913 (Tex. Civ. App. - Dallas 1976, writ ref'd n.r.e.). See Open Records Decision Nos. 255 (1980); 203, 184 (1978); 175 (1977). According to the above quotation RSR Corporation has taken extensive measures to protect the confidentiality of its "trade secrets." Based on the facts presented we conclude that the first three of the Restatement's criteria, supra, are satisfied. Compare Open Records Decision Nos. 255 (1980); 184 (1978) (no evidence of attempts to maintain confidentiality of information there involved).

Turning to the nature of the information itself, we have examined the materials contained in "Exhibit C," and are of the opinion that said materials contain "trade secrets" within the meaning of the above standards. The information is largely technical in nature and, as previously noted, related to raw material usage, production methods, and production and emission control processes and associated equipment. The value of this information to RSR Corporation and to its competition and the expense involved in developing it cannot be doubted, and we also believe it is likely that specific harm would inure to the corporation if the information is released and its competitors thereby obtained it. Compare Open Records Decision No. 203 (1978) (no evidence that cab companies would suffer specific harm if information there involved were released). We therefore conclude that the last three of the aforementioned criteria are satisfied.

For these reasons, we conclude that you may withhold the information contained in Exhibit C under section 3(a)(10). Our conclusion renders a discussion of section 3(a)(4) unnecessary.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Mark White', with a stylized, flowing script.

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